COMPLIANCE BOARD OPINION NO. 96-9

May 15, 2003

Mr. Michael B. Smith

The Open Meetings Compliance Board has considered your complaint dated July 14, 1996, in which you allege that the Mayor and City Council of College Park violated the Open Meetings Act at its meeting on June 17, 1996. You allege that a nominally open session of the Mayor and Council on that date, began at the conclusion of a closed session, in reality was an unlawfully closed session, held without proper notice. For the reasons set forth below, the Compliance Board concludes that the Act was violated.

I

Complaint and Supplemental Filings

On June 17, 1996, the Mayor and Council held a specially scheduled work session to hear presentations from two developers regarding the possible construction of a new city hall. Your complaint does not allege any defect in the notice provided for this session. Nor is there any complaint about the public's access to this session.

The event that forms the basis for your complaint occurred at the end of this open session. The Mayor and Council, according to your complaint, "voted to go into closed, executive session to hear part of a developer's proposal regarding financing.... Members of the public, including at least one journalist, were present in the audience up until the time we went into closed session, and then they were told to leave. As they left, a journalist (Davis Kennedy of the *College Park Local New*) asked if we intended to go back into open session later. The Mayor told him that we would *not*."

The discussion in the closed session evidently continued for some while.[1] Then the Mayor and Council adjourned from closed to open session, "despite

1 A vote took place during the closed session. You suggest that this vote was unlawful under the Charter of College Park. The Compliance Board declines to address this matter, for its authority is limited to interpretations of the Open Meetings Act. §10-502.5(d)(2) of the State Government Article.

the prior statement to Mr. Kennedy and public that we would do no such thing." Your complaint points out that a motion was presented and approved during this second open session. This action occurred, however, with no public observation: "The audience had all left and gone home, having been misled into believing that there would be no further public proceedings to witness, much less a chance for citizen participation."

In a letter supplementing your complaint, you described the exchange between the reporter and the Mayor this way: "Davis Kennedy of the *College Park Local News* inquired as to whether the Mayor and Council would go back into open session later that evening, and ... the Mayor replied 'No.' I should note that Mr. Kennedy stood up and addressed the entire assembled body with his question, loudly enough that everyone in the room could hear. The Mayor's reply was a similarly open and clear statement to all who were present." You also provided the Board with an account of the events at the end of the first closed session that appeared in the August 29, 1996, edition of the *College Park Local News*. The newspaper account is as follows: "Kennedy [the reporter] had asked at the time the meeting was closed whether there would be an open meeting afterwards and was assured by Mayor Joe Page that there would not be.... Kennedy said he would have stayed at the meeting site for the open meeting had he known that one would be held."

Finally, another member of the Council, Councilwoman Sherill T. Murray, provided the Board with her own recollection of the events in question. Councilwoman Murray states that, at the end of the first open session, "the Mayor cleared the room to begin the executive session. Mr. Davis Kennedy of the *Local News* had been sitting in the audience and in a clearly audible manner inquired if the meeting would be reopened later. Mayor Joseph Page, in a manner clearly audible, replied to him that it would not. Mr. Kennedy, again clearly audible, indicated to Mayor and Council that he would stay around if the meeting was going to be reopened."[2] Councilwoman Murray also points out that, "when the statement was made at approximately 9:00 p.m. that there would be no further public portions of the meeting, it became impossible to give adequate public notice that a public meeting will be held at 11:00 p.m., and, in fact, no such public notice was even attempted to be posted at any location."

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2 Councilwoman Murray indicates that this exchange subsequently caused her to object to the second open session and to decline to participate in it.

II

Response of Mayor and Council

In a timely response on behalf of the Mayor and Council, City Attorney Robert H. Levan, Esquire, contend that the Act was not violated. Citing §10-510(c) of the State Government Article, Mr. Levan asserts that "the Open Meetings Act places the burden of proving an open meetings violation upon the complainant." Mr. Levan points out that the exchange between Mr. Kennedy and Mayor Page was not noted in the minutes of the meeting and was characterized in various ways in your complaint. In particular, Mr. Levan observes that your initial description frames the question as whether the Mayor and Council "*intended* to go back into open session later. The Mayor told him that we would not." This formulation, according to Mr. Levan, is significantly different from a flat denial that there would be any further open session, because a denial of an intention to have a further open session "allows an inference that a return is possible ...."

In a subsequent letter amplifying the City's position, Mr. Levan asserts "that the statement of the Mayor regarding a return to open session was made in response to Mr. Davis Kennedy's question concerning whether the Council *intended* to return to open session. This response occurred after Council voted to go into executive (closed) session and while people were 'milling around' and leaving the Council chambers. The importance of this fact is that the statement of the Mayor at this point was purely incidental, and was solely a statement of the Mayor's opinion made in response to a question regarding the Council's intention." Mr. Levan, while characterizing the Mayor's statement as "perhaps unfortunate," contends that it was merely "an expression of his personal assessment and was not an expression of the full Council."

Mr. Levan also finds significant the omission from the minutes of any reference to the Mayor's comment. This omission, Mr. Levan suggests, was the dog that did not bark: "[T]he minutes *would* have made reference to a statement of the Mayor concerning a return to open session if ... the statement had been made while Council was actually in session ... and ... if the statement had been more than the response of the Mayor expressing his opinion regarding future intentions."

III

Analysis

The Compliance Board will first address the procedural issue raised by the City: Does "the complainant [have] the burden of proving the violation"?

The quoted phrase comes from a subsection, §10-510(c), that reads in its entirety as follows: "In an action under this section, it is presumed that the public body did not violate any provision of this subtitle, and the complainant has the burden of proving the violation." The phrase "an action under this section" means a petition filed with the circuit court. §10-510(b). Neither the presumption against a violation nor the burden of proof provision in §10-510(c) has any application whatever to a complaint to the Compliance Board.

There is no "burden of proof" for a complaint to the Board. The Board reviews all of the information submitted to it. If that information is sufficient for the Board to reach a conclusion about a violation, the Board will issue an opinion containing that conclusion. §10-502.5(d). If the Board cannot reach a conclusion, either because the information is insufficient or the evidence available is evenly balanced, the Board will issue an opinion explaining the reason for its inability to reach a conclusion. §10-502.5(f)(2).[3]

Turning to the merits of this complaint, the Compliance Board does have enough information to reach a conclusion. Our conclusion is that the Act was violated.

The general rule of the Open Meetings Act is that "a public body shall meet in open session." §10-505. As we have said on prior occasions, this requirement is not satisfied if a session is open in name but not reality. *See* Compliance Board Opinions 94-6 (August 16, 1994) and 96-4 (May 1, 1996).

The latter of these two opinions is particularly instructive. In that instance, the complaint alleged that official presiding at an open session announced that the meeting was adjourned. Members of the public understandably assumed that the meeting was over and left. In fact, the public body then continued its discussion. We expressed the view "that if a public body announces the adjournment of its meeting and pauses while members of the public leave, any subsequent discussion is not held in an 'open session' as required by §10-505, even if the door to the room remains open. As a practical matter, this manner

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3 For an example of the Board's inability to reach a conclusion about a violation, see Compliance Board Opinion 94-5, at 4, 8, and 16 (July 29, 1994).

of proceeding would cause a reasonable member of the public to conclude that the meeting was over." Opinion 96-4, at 4. Therefore, the subsequent discussion, although theoretically open to a member of the public who chanced upon it, violated the Act's open session requirement.

Essentially the same problem exists here. Whatever the precise wording of the reporter's question, the Compliance Board is convinced that a reasonable member of the public would have understood the Mayor's response to indicate that no further open session was to be held that evening. Certainly, the reporter — who had the most reason to be alert to the possibility of a resumption of the open session — took the Mayor's response to mean that no such resumption would occur.

Further, the Compliance Board finds no merit in the City's objection that, because the Mayor's response was given during the hiatus between the first open session and the closed session and was not reported in the minutes as an official pronouncement of the Council, the Council should not be held responsible for the Mayor's comment. In the Compliance Board's view, the Council is responsible for the foreseeable practical effect of the Mayor's response to the reporter's question. That is, the Council is responsible for having conducted a nominally open session under circumstances that, as a result of the Mayor's response to the reporter, effectively excluded members of the public.

IV

Conclusion

For the reasons stated above, the Compliance Board finds that the Mayor and City Council of College Park violated the Open Meetings Act on June 17, 1996, by holding a nominally open session that was in reality closed to members of the public.

OPEN MEETINGS COMPLIANCE BOARD

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